Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

CURTIS MAJOR, DAVID DOBSON,
BENJAMIN BUCHANAN, TROY BUCHANAN,
and CARLOUS L. BURCH,

Petitioners,

v.

ELLER MEDIA COMPANY, a Foreign Corporation
doing business in Florida,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer is subject to liability under Title VII for adopting, without independent review, the discriminatory hiring recommendations of a non-employee.

PARTIES TO THE PROCEEDING

In addition to the Petitioners, there were two additional Plaintiffs in the proceeding before the United States District Court for the Southern District of Florida: Edward Crouch and Jamie Young. These Plaintiffs voluntarily dismissed their claims against Respondent Eller Media Company.

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Appendix B — Order Granting Summary Judgment And Final Judgment Of The United States District Court For The Southern District Of Florida Dated August 10, 2002 And Filed August 13, 2002 ..... 3a

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit which affirmed the dismissal of Petitioners' claims under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq*. (2003).

OPINIONS OF THE COURTS BELOW

The District Court's opinion (per Moreno, J.) granting Respondent's Motion for Summary Judgment is attached hereto as Appendix B (hereinafter "Pet. App. B"). The decision of the Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit"), affirming the District Court's order granting summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, is reported in the Table Opinions of the Eleventh Circuit at *Major, et al. v. Eller Media Co.*, Case No. 02-14959, 2003 U.S. App. LEXIS 17871 (11th Cir., June 6, 2003). The decision is attached hereto as Appendix A (hereinafter "Pet. App. A").

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on June 6, 2003. This Court has jurisdiction to issue the requested Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2000e(b) of the Title VII of the Civil Rights Act of 1964 provides, in relevant part:

§ 2000e. Definitions

> **(b)** The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS §§ 501(c)] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b) (2003).

Section 2000e-2 of the Title VII of the Civil Rights Act of 1964 provides, in relevant part:

§ 2000e-2. Unlawful employment practices

> (a) Employer practices. It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2003).

STATEMENT OF THE CASE

Petitioners are five African-Americans who were employed by AK Media in its South Florida location. AK Media South Florida was an outdoor advertising company engaged in the business of selling and constructing outdoor advertising such as poster panels, billboards and transit shelters. In the fourth quarter of 1999, the Respondent, Eller

Media Company (hereinafter "Eller" or "Respondent") announced that it would purchase the assets of AK Media's South Florida operation. The terms of the Asset Purchase Agreement state that Eller would determine, in its sole discretion, which of AK Media's existing employees would be offered employment at the close of the transaction. At the time of the sale, on January 4, 2000, AK Media's South Florida operation had approximately one hundred and twelve (112) employees. Approximately sixty-two (62) of these employees worked in the Operations Department, which included four sub-departments: rotary/construction, posting, painting and electrical. Petitioners were employed in the Posting Department of AK Media's Operations Department. Don Hall was the Operations Manager for AK Media.

Prior to the sale, in early December 1999, Don Hall was advised by AK Media's President, Claire Lawson, to set aside time to meet with Eller's Executive Vice-President of Operations, Mike Deeds. Soon thereafter, Mr. Hall and Mr. Deeds met in Miami and discussed AK Media's operations and Mr. Hall escorted Mr. Deeds around AK Media's plant and facilities. At that time, Mr. Deeds instructed Mr. Hall to consider the number of people that were employed in AK Media's Operations Department and the extent of AK Media's equipment and inventory, and to "consider the possibility of a reduction in all categories." Mr. Deeds further indicated to Mr. Hall that he would soon be providing additional instructions to him relating to the Operations Department.

Mr. Deeds called Mr. Hall again later in December, 1999 and advised Hall that, for an Operations Department of AK Media's capacity, he thought twelve to thirteen employees would be sufficient to service the rotary/construction department, eight to ten employees would be sufficient to

service the posting department, two to three employees would be sufficient to service the painting department, four to five employees would be sufficient to service the electrical department and that one mechanic would suffice. Mr. Deeds again instructed Mr. Hall to think about these personnel numbers, to consider the number of employees he would possibly be working with and corresponding reductions in equipment.

A few days later, John Jacobs, Eller Media's new South Florida General Manager, conveyed to Mr. Hall that Hall should "decide and recommend people that would be able to be retained to maintain the numbers that Mike Deeds had given" to him and to "recommend to him names of people that [he] felt would be able to do the job." Based on the information conveyed to him by Eller Media's VP of Operations, Mike Deeds, and Eller Media's General Manager, John Jacobs, Mr. Hall understood that he had been "given the responsibility to fit the amount, the proper amount of people for each operation, in the operation, you know, to operationally run the company." Specifically, Jacobs gave Hall the task of selecting and recommending thirty-seven (37) operations department employees from a pool of sixty-two (62) for continued employment with Eller.

Pursuant to Jacobs' directions, Hall, while still an AK Media employee, compiled a list of individuals working in the AK Media Operation Department whom Eller should retain. John Jacobs adopted the list without independently reviewing Hall's selections. On January 4, 2000, Eller's asset purchase transaction was completed. On that same day, all AK Media employees were terminated and they learned whether would be offered employment by Eller. On January 4, 2000, the Petitioners learned that they were not offered employment by Eller. On that same day, Don Hall was retained by Eller as its Operations Manager.

In March, 2000, Petitioners filed administrative charges of discrimination with the Equal Employment Opportunity Commission alleging that they were not hired and/or retained by Eller Media based on racially discriminatory hiring practices by Operations Manager, Don Hall. Eller formally responded to the EEOC administrative charges and described the decision-making process for the AK Media Operations Department employees as follows:

> John Jacobs, the General Manager of Eller, requested that Don Hall, the Operations Manager, and Bill Hull, the Assistant Operation Manager for AK Media, make recommendations to him as to whom Eller should consider for positions with the company. Mr. Hall and Mr. Hull were faced with the difficult and disheartening task of selecting thirty-seven employees from a pool of sixty-two . . . Although Mr. Hall made the recommendations to Eller Media, he had no authority to make the hiring decisions. The authority to hire lay solely with John Jacobs. Mr. Jacobs gave Mr. Hall approximately two weeks to provide him with the recommendations and requested that Mr. Hall recommend the best individuals for the available positions.

Subsequently, on October 13, 2000, this action was filed in the Southern District of Florida by Petitioners against Eller alleging that they were not retained or hired by Eller Media following its purchase of AK Media's South Florida Operation based on their color and race in violation of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.*, the Civil Rights Act of 1870, *as amended*, 42 U.S.C. § 1981, and the Florida Civil Rights Act, § 760.01, *et seq.*,

Fla. Stat. (2000). Petitioners alleged that Eller's hiring decisions were based on the intentionally racially discriminatory hiring recommendations of Don Hall, then an AK Media employee, to whom Eller specifically delegated that responsibility and which recommendations Eller adopted. Jurisdiction in the court of first instance, the United States District Court for the Southern District of Florida, was invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(F)(3). The Court had supplemental jurisdiction over Petitioners' state law claims pursuant to 28 U.S.C. § 1367(a).

Following extensive discovery, Eller moved for summary judgment and argued that each Petitioner released Eller from liability, that Eller could not be held liable for Don Hall's actions and, even if Eller could be held liable, no plaintiff could demonstrate the existence of genuine issues of material fact with respect to the pretextual nature of Don Hall's legitimate non-discriminatory reasons for not recommending them for hire by Eller.

On August 13, 2002, the District Court granted Eller Media's motion for summary judgment, without reaching the merits of Petitioners' claims, "[b]ecause this Court finds that no agency relationship existed between the alleged discriminator, Don Hall, and the Defendant, Eller Media." (Pet. App. B). The District Court explicitly found that:

1. "To determine which AK Media employees would be hired following the sale of AK Media assets, Eller sought the assistance of AK Media Operations Manager, Don Hall, to make the decision as to which Operations Department employees it should offer continued employment." (Pet. App. 4a-5a);

2. "Don Hall completed a list of individuals whom Eller should retain, and then met with Frank Sofia, AK Media's Vice President of Finance, and John Jacobs, the President of Eller to discuss the list [and] John Jacobs adopted the list almost wholesale." (Pet. App. 5a).

3. "As a result of Eller's retention decisions based on Don Hall's hiring recommendations, a higher percentage of African-American employees in AK Media's Operation Department were not offered positions at Eller than non-African American employees." (Pet. App. 5a).

The record evidence supporting the District Court's finding that a higher percentage of African-American employees were not offered positions at Eller than non-African-American employees reflects that, as of January 4, 2000, there were sixty-two (62) employees in the AK Media Operations Department. Of the 62 employees, nine (9) were African American and fifty-three (53) were non-African American. Only two (2) of the nine (9) or 22% of the African American Operations Department employees were offered employment by Eller. In contrast, thirty-six (36) or 68% percent of non-African American Operations Department employees were offered employment by Eller. The imbalance between African-Americans and non-African Americans was more severe in the Posting Department of the Operations Department where five (5) out of six (6) African-Americans, including all of the Petitioners in this case, were not retained by Eller whereas two (2) of eleven (11) non-African Americans were not retained.

Notwithstanding its factual findings, however, the District Court concluded that a decision on the merits could not be reached because "the law at this time precludes legitimately aggrieved persons – and at least two of the Plaintiffs fall within that category – from obtaining relief." (Pet. App. 7a). The District Court concluded that it was "in no position to depart from case precedent and attach liability for the acts of a non-employee" and, thus, could "not look to Mr. Hall's actions in determining the liability of Eller." (Pet. App. 7a, 11a).

On appeal to the Eleventh Circuit, Petitioners sought review of the District Court's order holding that Don Hall's non-employee status precluded a determination on the merits. Similarly, Eller sought an affirmance of the order granting summary judgment only on the grounds relied upon by the District Court. On June 6, 2003, the Court of Appeals affirmed *per curiam* without opinion pursuant to Local Rule of Appellate Procedure, 11th Cir. R. 36-1.

This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

This Court should issue a Writ of Certiorari to review the Eleventh Circuit decision affirming the District Court's order granting summary judgment to the Respondent Employer for two reasons. *First*, the Eleventh Circuit's affirmance of the District Court's order shields an employer from Title VII liability for a tangible employment action based on the discriminatory recommendation of a non-employee and establishes a permissible avenue for the wholesale avoidance of Title VII liability. *Second*, the decision of the Eleventh Circuit erroneously affirms an

important question of federal law which contravenes the statutory language of Title VII and sanctions a serious departure from this Court's application of common law agency principles to Title VII.

I. The Writ Should Issue Because the Eleventh Circuit Decision Precludes Employer Liability for Tangible Employment Actions Which Are Based on the Discriminatory Recommendations of a Non-Employee.

This case merits review by this Court because the decision below, affirmed on appeal, shields an employer from liability under Title VII for its discriminatory failure to hire when that decision is based on the employer's solicited recommendation of a non-employee. It is undisputed that the challenged employment decisions at issue in this case are those of the employer, Eller Media. The District Court's fundamental error – holding that Eller cannot be held liable for its hiring decisions based on the recommendations of a non-employee notwithstanding its findings that Eller requested that the non-employee to make the recommendations, that Eller adopted the non-employee's recommendations "wholesale" and that, as a result of Eller's retention decisions based on the non-employee's recommendations, a higher percentage of African-American employees in AK Media's Operation Department were not offered positions at Eller than non-African American employees – has serious and potentially wide-ranging consequences in Title VII litigation.

Under Title VII of the Civil Rights Act of 1964, it is an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2003). Section 2000e(b) of the Act defines employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, **and any agent of such a person . . .**" 42 U.S.C. § 2000e(b) (2003) [emphasis added].[1] In acknowledging Congress' decision to explicitly include the term "agent" in § 2000e(b), this Court recognized that "the very definition of employer in Title VII, as including an 'agent,' expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability . . ." *Faragher v. City of Boca Raton*, 534 U.S. 775, 791-792 (1998); *see also Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). Rather than engraft sections of the Restatement (Second) of Agency into Title VII, a court's obligation is to "adapt agency concepts to the practical objectives of Title VII." *Faragher*, 524 U.S. at 803 n.3.

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1. The starting point in the analysis of a Title VII case is the statute itself. *See Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2153, 156 L. Ed. 2d 84, 93-94 (2003). "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Amtrak v. Morgan*, 536 U.S. 101, 110 n.5 (2002) *quoting Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

This Court, in *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), held that the Los Angeles Department of Water and Power violated Title VII's prohibition against sex discrimination when it required its female employees to make higher monthly pension fund contributions than male employees. 435 U.S. 702, 718 n.33 (1978). In so doing, the Court cautioned that, while Title VII primarily governs "relations between employees and their employer, not between employees and third parties," an employer could not avoid responsibility for discriminatory benefit programs by delegating them to third parties. *Manhart*, 435 U.S. at 718 n.33 (1978). Five years later, in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans et al. v. Norris*, 463 U.S. 1073 (1983), this Court addressed whether "Title VII also prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly benefits than a man who has made the same contribution." 463 U.S. 1073, 1075 (1983). Unlike the employer in *Manhart*, the state employer in the *Arizona* case did not provide the fringe benefit plan itself; rather, the State provided employees with the opportunity to voluntarily obtain annuities as part of its deferred compensation plan by selecting several insurance companies, among whom employees could choose, to provide retirement benefits. *Arizona*, 463 U.S. at 1089. The insurance companies, in turn, used sex-based mortality tables to calculate monthly retirement benefits which resulted in a lower monthly benefit to female retirees because women live longer than men. *Id.* at 1077. The Court first determined that, under *Manhart*, the State of Arizona would violate Title VII if they had run the entire deferred compensation plan themselves. *Id.* at 1079-1987. Turning to the precise issue before it, the

Court then analyzed whether the employer's conduct was "beyond the reach of the statute because it is the companies chosen by [the employer] to participate in the plan that calculate and pay the retirement benefits" and not the employer itself. *Id.* at 1087. Noting that 42 U.S.C. § 2000e applies to employers and "any agent" of an employer, the Court held that "there can be no serious question" that the employer is liable for the discriminatory terms on which annuities were offered to its employees because the employer selected the insurance companies which provided employee benefits on discriminatory terms. *Id.* 1087 & n.16. The Court held that an "employer that adopts a discriminatory fringe benefit scheme that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination" because:

> [i]t would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a non-discriminatory basis. An employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all.

Id. at 1090-91. The Court noted that "[s]uch a result would be particularly anomalous where, as here, the employer made no effort to determine whether third parties would provide the benefit on a neutral basis." *Id.* 1091 n.24.

The Court's reasoning in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, et al. v. Norris* applies with equal force to Eller's decision not to retain the Petitioners based on the discriminatory hiring recommendations of Don Hall, its chosen agent. It would be inconsistent with the broad remedial purposes of Title VII to permit Eller, who delegated the hiring recommendation and selection process to Don Hall and adopted his discriminatory recommendations, to avoid liability for its decisions simply because Eller hired Don Hall ***after*** it adopted his discriminatory hiring recommendations. Don Hall's "non-employee" status as of the January 4, 2000 closing of the Asset-Purchase Transaction notwithstanding, the Eleventh Circuit erred in affirming the District Court's conclusion that Don Hall was not Eller's "agent" for purposes of Title VII.

Section 1 of the Restatement (Second) of Agency (1958) defines "agency" as a legal relationship characterized by the "manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." RESTATEMENT (SECOND) OF AGENCY, § 1(1) (1958).

> As a matter of well-settled agency law, a principal may be held liable for the discriminatory acts of his agent if such acts are within the scope of the agent's [ ] authority, even if the principal neither authorized nor ratified the acts.

City of Chicago v. Matchmaker Real Estate Sales Center, 982 F.2d 1086, 1096 (7th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). The District Court's order in this case acknowledges that Eller directed Don Hall to do much more than identify the "good" employees and provide their

personnel files to Eller for review and decision. Finding that "Eller sought the assistance of AK Media Operations Manager, Don Hall, to make the decision as to which Operations Department employees it should offer continued employment," that "Don Hall completed a list of individuals whom Eller should retain," and that "John Jacobs adopted the list almost wholesale," the record reflected that Eller, through General Manager John Jacobs and Executive Vice-President Mike Deeds, gave Don Hall the exact numbers by which it sought to reduce existing AK Media personnel, asked Hall to provide Eller with his recommendations as to which specific AK Media employees Eller should retain, identified criteria on which to base his recommendations, dictated the time frame during which Hall was to provide his recommendations, and required Hall to present them to Eller. In compliance with these directives, Mr. Hall prepared a written list of AK Media employees whom he recommended to Eller for continued employment by Eller and provided it to Mr. Jacobs. Jacobs adopted Hall's hiring recommendations without independently reviewing them. These facts establish an agency relationship between Eller Media and Don Hall sufficient for purposes of Title VII. The District Court's analysis, as affirmed by the Eleventh Circuit, results in Eller's immunity for racially discriminatory hiring decisions premised solely upon Eller's delegation of the selection and recommendation tasks to Don Hall because Hall was not on Eller's payroll as of the date of the hiring decisions.[2] This Court should correct this result.

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2. That Don Hall acted *gratuitously* or agreed to act for the benefit of Eller without consideration (i.e., payment and/or the promise of a position in the new company) in agreeing to make the hiring recommendations requested by Eller does not negate the existence of an agency relationship. *See* RESTATEMENT (SECOND) OF

(Cont'd)

II. The Writ Should Issue Because the Decision of the Eleventh Circuit Sanctions a Serious Departure from this Court's Application of Common Law Agency Analysis to Title VII.

This Court recently applied the well-settled principle that "traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer v. Holley*, 537 U.S. 280, 123 S. Ct. 824, 829, 154 L. Ed. 2d 753, 761 (2003) (quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756 (1998)). In the Title VII context, traditional agency principles guide these liability determinations. *See Burlington Industries, Inc.*, 524 U.S. 742, 754-55; *Faragher v. City of Boca Raton*, 524 U.S. 755, 803 n.3 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("Congress wanted courts to look to agency principles for guidance."). The term "agent" should be liberally construed to effect Title VII's remedial purposes. *See Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans et al. v. Norris*, 463 U.S. 1073 (1983).

(Cont'd)

AGENCY, § 225 cmt. a ("Consideration is not necessary to create the relation of principal and agent, and it is not necessary in the case of master and servant."); *see also Buel v. ASSE International, Inc.*, 233 F.3d 441 (7th Cir. 2000) (holding international foreign exchange student organization liable for volunteer's failure to protect foreign exchange student). *See Cabrera v. Jakabovich*, 24 F.3d 372, 385-88 (2d Cir. 1994), *cert. denied*, 513 U.S. 876 (1994) (In the Fair Housing context, "[t]he fact that the tenants paid the broker does not preclude a finding that the broker acted as the owner's agent in renting the apartment.").

These decisions, including *Meyer v. Holley*, *Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth*, address liability for violations of civil rights laws and establish that a principal is liable for the civil rights violations of their agents when those violations are committed in the exercise of delegated authority. *See Meyer*, 123 S. Ct. at 829, 154 L. Ed. 2d at 761; *Burlington Industries, Inc.*, 524 U.S. at 761-66; *Faragher*, 524 U.S. at 802-10. Under these common law agency principles, where the "tortious conduct is made possible or facilitated by the actual agency relationship," Don Hall's racially discriminatory animus is imputed to Eller. *Faragher*, 524 U.S. at 802-03 *citing* RESTATEMENT (SECOND) OF AGENCY, § 219, cmt e. An employer is held responsible for the acts of its management level employees when they unlawfully carry out traditional employer functions, such as hiring and firing, because these decisions are the "means by which the supervisor brings the official power of the enterprise to bear on subordinates . . . [which] requires an official act of the enterprise, a company act." *Burlington Industries, Inc.*, 524 U.S. at 762. While not an "employee" of Eller, Don Hall carried out Eller's traditional employer functions at Eller's request. Even though Eller hired Hall ***after*** it adopted his employment recommendations, Eller delegated to Don Hall (and Don Hall accepted) the authority to recommend whom at AK Media should be offered continued employment with Eller. Eller's hiring decisions were based on Don Hall's recommendations, from which Eller benefitted. Don Hall's discriminatory animus toward African-American AK Media employees was facilitated by Eller's delegation of authority to him. Eller's wholesale adoption of Hall's recommendations resulted in tangible employment action – an act for which the employer, Eller, should be held responsible.

Under the analysis of *Meyer*, *Faragher* and *Burlington*, Eller would undoubtedly be held accountable under Title VII for failing to hire AK Media's African-American employees based on their race had John Jacobs independently made the hiring decisions rather than merely adopting Don Hall's recommendations. As with managerial employees who misuse delegated authority, "there is assurance the injury could not have been inflicted absent the agency relation." *Burlington Industries, Inc.*, at 761-62. Absent Eller's decision to delegate the selection and recommendation authority to Don Hall, no such injury would have been inflicted. *See Faragher*, at 797 (quoting RESTATEMENT (SECOND) OF AGENCY, § 229 cmt. a (1958)) ("'whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed.'"). This Court should correct this result.

CONCLUSION

For the reasons set forth above, Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit which affirmed the dismissal of Petitioners' claims under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.* (2003).

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JUNE 6, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14959

D. C. Docket No. 00-03870 CV-FAM

CURTIS MAJOR, DAVID DOBSON, et al.,

Plaintiffs-Appellants,

versus

ELLER MEDIA COMPANY,
a Foreign Corporation doing business in Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 6, 2003)

Before DUBINA, BLACK and HULL, Circuit Judges.

PER CURIAM:

Appendix A

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

---

1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AUGUST 10, 2002 AND FILED AUGUST 13, 2002

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 00-3870-CIV-MORENO

CURTIS MAJOR, DAVID DOBSON,
BENJAMIN BUCHANAN,
TROY BUCHANAN, and CARLOUS L. BURCH,

Plaintiffs,

vs.

ELLER MEDIA COMPANY, a Foreign Corporation
doing business in Florida,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

Defendant has moved for summary judgment on all claims in the Complaint filed by the five remaining Plaintiffs alleging discrimination based on race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), The Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and the

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Florida Civil Rights Act of 1992, Chapter 760 of the Florida Statutes ("FCRA").

Because this Court finds that no agency relationship existed between the alleged discriminator, Don Hall, and the Defendant, Eller Media ("Eller"), this Court grants Eller's Motion for Summary Judgment.

I. Background

Eller first announced its intent to acquire AK Media during the fourth quarter of 1999 and immediately began plans to consolidate job functions and downsize the combined Eller Media/AK Media South Florida operation. At the time of the acquisition, AK Media sold painted bulletins, poster panels and transit shelters and maintained an in-house printing company. Eller's existing operation in South Florida was an outdoor advertising company with only one product line — transit shelters.

At the time of the sale, AK Media had over 112 employees, 60 of which were employed in its operations department. The Eller Media facility employed only 27 employees in its operations department. Eller planned on running the combined organization with 46 employees in the operations department. It expected to offer positions to about 40 AK Media employees and 6 existing Eller employees in the operations department.

To determine which AK Media employees would be hired following the sale of AK Media's assets, Eller sought the assistance of AK Media Operations Manager Don Hall to

make recommendations to Eller as to which Operations Department employees it should offer continued employment. Don Hall[1] compiled a list of individuals whom Eller should retain, and then met with Frank Sofia, AK Media's Vice President of Finance, and John Jacobs, the President of Eller South Florida, to discuss the list. John Jacobs adopted the list almost wholesale.

On January 4, 2000, Eller purchased the assets of AK Media. That same day, all AK Media employees were terminated and Plaintiffs learned they would not be hired by Eller. At the same time, Eller made it known to which of AK Media's existing employees it would offer employment. Also on January 4, 200, all five Plaintiffs entered into a Release Agreement with AK Media and its "directors, officers, agents, trustees, employees, employee-spouses, successors and assigns," releasing AK Media from liability arising out of their employment and termination from AK Media.

As a result of Eller's retention decisions based on Don Hall's hiring recommendations, a higher percentage of African American employees in AK Media's Operations Department were not offered positions at Eller than non-African American employees.

---

1. Don Hall was not Eller's employee and had not received a job offer from Eller when he made these recommendations. He did not receive an offer of employment until all other AK Media employees received theirs on January 4, 2000.

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II. Analysis

A. Standard of Review

Summary judgment is authorized when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The nonmovant must present more than a scintilla of evidence in support of the nonmovant's position. A jury must be able reasonably to find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

B. Vicarious Liability[2]

Plaintiffs attempt to hold Eller liable for the discriminatory acts of Don Hall. Plaintiffs argue either Eller's action was merely a "rubber stamp" of AK Media employee Don Hall's

2. The Court notes the irony of Plaintiffs arguments. First, they argue that the actions of an agent of a non-party should be imputed to the Defendant. They then argue that the Release Agreement does not apply to the Defendant because the record evidence of the Agreement demonstrates the parties' intentions that Eller not assume any obligations with respect to AK Media employees and that Eller is not merely a continuation of AK Media.

allegedly discriminatory recommendations or that Don Hall was acting as Eller Media's agent when he committed the allegedly discriminatory acts. Plaintiffs claim, under either analysis, Eller is liable for Don Hall's actions.

Unfortunately, the law at this time precludes legitimately aggrieved persons — and at least two of the Plaintiffs fall within that category — from obtaining relief. The case of statutes of limitation, releases, arbitrations, pre-emption, limited liability, etc., may, at times, preclude a finding on the merits of a complaint. Nevertheless, this trial court is in no position to depart from case precedent and attach liability for the acts of a non-employee.

1. Agency

Eller claims it cannot be held vicariously liable for the discriminatory conduct of a non-employee or non-agent. *See Graves v. County of Dauphin*, 98 F.Supp. 613, 619 (M.D. Penn. 2000); *Williams v. Grimes Aerospace Co.*, 988 F.Supp. 925, 933 (D. S.C. 1997) (dismissing Plaintiffs Title VII claims of racial discrimination where the alleged discriminatory acts were committed by a non-agent/non-employee). Eller argues that because Don Hall was not an employee of Eller Media at the time of the alleged discriminatory conduct, vicarious liability cannot be premised on his acts unless he is considered to have been an agent of Eller Media.

Eleventh Circuit precedent requires a court to apply the general principles of common law in determining agency for the purposes of respondeat superior in a Title VII suit. *Bahadirli v. Domino's Pizza*, 873 F.Supp.1528,1537 (M.D. Ala. 1995); *see also Cobb v. Sun Papers, Inc.*, 673 F.2d 337,

341 (11th Cir. 1982). Because Mr. Hall was not an employee of Eller at the time he made the staffing recommendations, this court must look to the *Restatement (Second) of Agency § 1 (1)* (1957) for an agency determination. The Restatement defines agency as "the fiduciary relation, which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* The comment to section 1(1) clarifies that "the principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control." *Id.*, cmt. a. Additionally, the comments define agency as a legal concept "which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." *Id.*, cmt. b.

The issues turn on whether Eller consented to have Don Hall to act on *behalf* of Eller, subject to Eller's control, and whether Don Hall agreed to this. Viewing the facts in a light most favorable to the Plaintiffs, both Eller and AK Media requested Don Hall to supply staffing recommendations to Eller. Don Hall accepted this undertaking.

The key issue is whether Eller Media had **control** of Mr. Hall's activities during this undertaking. Based on the record evidence, although Eller requested Mr. Hall to provide staffing recommendations, and Eller retained control over the ultimate decision to hire, Eller did not control the process through which Mr. Hall conducted his activities.

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A factually similar case, *Williams*, involved alleged discrimination by both a staffing company and the contracting employer. *Williams*, 988 F.Supp. at 931. The Plaintiff attempted to base liability on a theory of agency — that each company was acting as the agent of the other. *Id.* at 933. The court stated "the mere fact that one of the contracting parties is empowered to give general directions as to what is to be done without control over the methods or means of doing it does not necessarily have the effect of creating the relation of principal and agent or master and servant." *Id.* In *Williams*, the contracting employer relayed to the staffing company the names of specific individuals it wished to employ. *Id.* The staffing company merely acted as a conduit. The court, however, did not find the requisite level of control necessary to establish an agency relationship. *Id.* It follows then, that where Eller did not name specific individuals it wished to employ, nor did it involve itself in Don Hall's selection process, it cannot be held vicariously liable under a theory of agency.

The cases relied on by plaintiff, *Moham v. Steego Corp.* and *O'Keefe v. Varian Associates, Inc.*, for the proposition that Don Hall was Eller Media's agent do not compel a contrary result. In *Moham v. Steego*, 3 F.3d 873 (5th Cir. 1993), a former employee of a company that was the target of an asset purchase brought a Title VII disparate treatment claim against his former employer for the actions of his supervisors when they refused to allow him to apply for a job with the purchasing company. Mansfield, the purchaser, had given the plaintiffs' supervisors applications for employees, authorized the supervisors to accept the completed applications on its behalf, and had offered the supervisors

jobs before the sale was consummated. Unlike here, the plaintiff in *Moham* sued the seller corporation, not the buyer. Applying section 219 of the Restatement, the court reasoned that, "a master is liable for the acts of his servants committed while acting in the scope of their employment." *Id.* The court concluded that the supervisors were not the selling company's agents because they were acting exclusively for the benefit of the buying company. *Id.* at 876.

The plaintiffs extrapolate that Don Hall, an AK Media employee, was an agent of Eller because he may have acted at least in part to benefit Eller when he provided staffing recommendations. It is undisputed, however, that Hall had no authority, apparent or otherwise, to hire any employees for Eller, and Hall did not have a job offer at the time he made the staffing recommendations. Additionally, Mr. Hall was also benefitting both AK Media and himself when making these recommendations. He was not acting *exclusively* for the benefit of Eller. Even if he were, the *Moham* court did not find that acting exclusively for the benefit of the buyer company made the supervisors agents of the buyer, but instead the court merely held that when the supervisors were acting exclusively for the benefit of the buyer company, they were not acting as agents of the seller corporation. *Id.*

Plaintiff's reliance on *O'Keefe v. Varian Associates, Inc.*, 1998 Westlaw 417498 (N.D. Ill. 1998) is equally misplaced. The court in *O'Keefe* did not, as Plaintiffs suggest, hold that a supervisor of a selling company becomes an agent of the non-employer purchasing company simply by making staffing recommendations to the purchasing company. Like *Moham*,

the selling company's supervisor already had a job offer from the purchasing company when he provided staffing recommendations to the purchasing company. *Id.* at *4. The *O'Keefe* court ruled that the supervisor of the selling company was **not an agent of the seller** where his actions were not motivated by a purpose to serve the seller. *Id.* In fact, the court considered the involvement of the seller's supervisor only as it related to the plaintiffs' claims against the seller — not the claims alleged against the purchaser.

As to Varian, the purchaser, the court focused on Varian's human resources officer, not the alleged acts of the selling company's supervisor. The court did not even look to the supervisor's action in determining the liability of Varian.

Similarly, this court cannot look to Mr. Hall's actions in determining the liability of Eller. Even though the harasser in *Varian* had already received a job offer, and clearly made out a stronger argument for a finding of agency, the Eleventh Circuit did not find that the harasser was acting as the company's agent. This court must follow suit and not look to Mr. Hall's actions in determining the liability of Eller.

2. Cat's Paw or "Rubber Stamp" Liability

Plaintiffs argue Eller cannot avoid liability by merely asserting that the *de jure* decisionmaker, Mr. Jacobs, had no specific discriminatory intent, when all Mr. Jacobs did was "rubber stamp" the recommendation of Don Hall who did have such intent. *See Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1999)(finding "in a cat's paw situation, the harasser clearly causes the tangible employment

action, regardless of which individual actually signed the employee's walking papers."). Indeed, "where the titular decisionmaker is no more than a cat's paw, courts have looked beyond the formal structure of the decisionmaking process and held defendant companies liable for the invidious bias of the *de facto* decisionmaker." *Bernstein v. Sephora*, 182 F.Supp.2d 1214, 1218 (S.D. Fla. 2002).

In *Llampallas*, a female employee brought a Title VII action against her former employer. 163 F.3d at 1239. The alleged harasser and decisionmaker were two different individuals. *Id.* at 1239-40. The Eleventh Circuit determined that when a plaintiff bases liability on the decision of a person who was not the alleged harasser, the plaintiff has the burden to prove that the harasser's discriminatory animus caused the decisionmaker to terminate her employment. *Id.* at 1248. The plaintiff attempted to meet this burden by showing that the harasser employed the decisionmaker as a "cat's paw" who merely rubber-stamped the harasser's decision. *Id.* at 1249. The Court found that cat's paw situations occur only where there is tacit approval of the harasser's decision to terminate the plaintiff. *Id.* Where there is an intervening action, the cat's paw situation is not applicable. *Id.*

Similarly, in *Bernstein*, a jewish woman sued her former employer in a Title VII action based on racial discrimination, alleging she was denied a promotion. 182 F.Supp.2d at 1215. This case presents another situation in which the alleged harasser was not the sole decision maker. Instead, a group of four managers, including the alleged harasser, met to discuss the selection of a store director for a new location. *Id.* at 1224.

The court found that based on these facts, a jury could reasonably infer that the harasser was the reason for the decision not to promote the plaintiff. *Id.* The court determined that because the harasser was one of four participants in a meeting where the promotion decision was made, his participation was truly direct. *Id.*

Defendant contends that *Llampallas* and *Bernstein* are factually distinguishable from Plaintiffs' case in that the alleged discriminators were, undisputedly, employees of the defendant. There is no caselaw in which a court has applied the "cat's paw" doctrine to find an employer liable for the discriminatory animus of a nonemployee. This employment relationship, found in all other "cat's paw" doctrine cases, is absent here.

Additionally, even if the employment status is irrelevant, Plaintiffs' claims still fail. No evidence indicates that John Jacobs held any discriminatory animus towards blacks or intended to discriminate against plaintiff. To show that an adverse employment decision by an admittedly unbiased decision-maker was nonetheless motivated by the discriminatory animus of another, plaintiff must show that the alleged discriminator's involvement in the decision was "truly direct." *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999). As the *Stimpson* court explained,

When the biased recommender and the actual decision maker are not the same person or persons, a plaintiff may not benefit from the inference of causation that would arise from their common identity. Instead, the plaintiff must prove that the discriminatory animus behind the recommendation,

and not the underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee. *Stimpson*, 186 F.3d at 1331.

In Stimpson, a former police officer sued the city and its civil service board under Title VII for sex discrimination. *Id.* at 1329. The police chief recommended the plaintiff's termination because of unprofessional conduct. *Id.* at 1330. He, however, had no power to unilaterally fire police officers. *Id.* Instead, the Civil Service Board of Tuscaloosa alone held this power. *Id.* Based on the police chief's recommendations, the Board conducted a hearing during which the plaintiff was represented by counsel and presented witnesses in her own defense. *Id.* The Board unanimously decided to terminate the plaintiff. *Id.*

The court found that plaintiff failed to establish a causal link between the alleged animus and her termination. *Id.* at 1331. This link was broken by the Board's hearing and independent decision to actually terminate her. *Id.* The court reaffirmed that "in some cases, a discharge recommendation by a party with no power to actually discharge the employee may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge." *Id.* This causation, however, must be direct.

The Eleventh Circuit refused to draw a bright line that an independent investigation precludes a finding of causation. It found that where the Board has the sole power to terminate officers, and where it conducted a hearing allowing the plaintiff to present witnesses, the plaintiff has failed to show

that a reasonable jury could find causation between the discriminatory animus and the decision to terminate her. *Id.*

Don Hall's involvement in the decision not to hire plaintiff was not "truly direct." He had no power to hire employees for Eller; that power remained, at all times, with Mr. Jones. Additionally, Mr. Hall's recommendations were considered and approved by another AK Media employee, Frank Sofia, before being submitted to John Jacobs, the ultimate decisionmaker. No evidence indicated that Mr. Sofia had a racial animus towards blacks or intended to discriminate against plaintiffs. Plaintiffs offer no evidence to dispute that Mr. Sofia independently reviewed Mr. Hall's recommendations. Even though Mr. Jacobs did not personally review the personnel files of any AK Media employee, he obtained information concerning these employees from Frank Sofia, who had worked at AK Media for nearly 14 years. This process removes Don Hall's animus from the decision making process such that it is no longer "truly direct."

WHEREFORE, the Defendant's Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of August, 2002.

s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 00-3870-CIV-MORENO

CURTIS MAJOR, DAVID DOBSON,
BENJAMIN BUCHANAN,
TROY BUCHANAN, and CARLOUS L. BURCH,

Plaintiffs,

vs.

ELLER MEDIA COMPANY, a Foreign Corporation
doing business in Florida,

Defendant.

FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 50 and 58, and in accordance with this Court's Order Granting Defendant's Motion for Summary Judgment, judgment is entered in favor of the Defendant ELLER MEDIA COMPANY and against Plaintiffs CURTIS MAJOR, DAVID DOBSON, BENJAMIN BUCHANAN, TROY BUCHANAN, and CARLOUS BURCH. Accordingly it is

ADJUDGED that all pending motions are DENIED as moot.

Appendix B

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of August, 2002.

s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

(2)

No. 03-360

Supreme Court, U.S.
FILED
OCT 9 - 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CURTIS MAJOR, DAVID DOBSON,
BENJAMIN BUCHANAN, TROY BUCHANAN,
and CARLOUS L. BURCH,

Petitioners,

v.

ELLER MEDIA COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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25 pp

RESTATEMENT OF THE QUESTION PRESENTED

Whether employees who waived their right to sue their former employer, the selling company, for any discrimination related to their termination, can hold the purchasing company vicariously liable for alleged discrimination of one of the selling company's managers, over whom the purchasing company had no control or right of control and who made hiring recommendations while employed by the selling company.

CORPORATE DISCLOSURE

Since July 2001, Eller Media Company has been known as Clear Channel Outdoor, Inc. Clear Channel Communications, Inc. is the parent company of Clear Channel Outdoor, Inc. and indirectly owns 100% of Clear Channel Outdoor, Inc.'s stock.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Eller Media Company, ("Eller Media"), requests that this Court deny the Petition for A Writ of Certiorari ("Pet.") filed by Curtis Major, David Dobson, Benjamin Buchanan, Troy Buchanan, and Carlous Burch ("the petitioners"). The petition seeks review of the Eleventh Circuit's summary affirmance of the district court's unpublished opinion granting summary judgment for Eller Media.

RESTATEMENT OF THE FACTS AND CASE

A. The Undisputed Facts

The petitioners are black, former employees of AK Media Florida ("AK Media"). AK Media was in the business of leasing land for billboards, constructing billboards, and posting advertisements on billboards in South Florida. All five petitioners worked in AK Media's Operations Department, which comprised sixty-four employees. Don Hall managed the Operations Department for ten years – from 1989 to January 2000. Other departments at AK Media included accounting, real estate, and sales. Frank Sofia, Vice President of Finance, was responsible for accounting, payroll, and benefits and was also the local human resources coordinator.

In the fall of 1999, Eller Media Company ("Eller Media"), a Phoenix-based corporation, offered to purchase AK Media's assets. By that time, AK Media had grown to 112 employees, and Eller Media had a small South Florida division comprising twenty-five employees. After closing on the purchase, Eller Media intended to combine the two companies' departments, consolidate job functions, reduce

personnel, and run a more cost-efficient operation. Eller Media selected John Jacobs, who at the time was based in Atlanta, to be president of its new South Florida Division.

In December, Mike Deeds, Eller Media's Executive Vice President of Operations, visited from Phoenix. He toured both the Miami and West Palm Beach AK Media plants with Don Hall. During his visit, Deeds asked Hall to "consider [the] reduction" of people, equipment, and fleet. Later that month, Deeds called Hall from Phoenix and gave him the number of employees he felt it would take to run the Operations Department after the acquisition. He told Hall to think about recommendations of employees to be hired by Eller Media and to give some thought to reducing the number of vehicles.

Around this time, John Jacobs began gathering information about the various AK Media departments and personnel. He asked Frank Sofia to work with Don Hall and Bill Hull, the assistant manager of the Operations Department, to come up with the best qualified and most productive workers because the new Eller Media would have significantly fewer employees. Jacobs told Sofia that, because he would be combining the Eller Media and AK Media departments but operating with a smaller workforce, he needed cross-trained employees and the most qualified and best performing employees. Jacobs did not speak to Hall.[1]

---

[1] Around this same time, Jacobs asked Sofia what kind of employee Don Hall was. Sofia told him that Hall was a good employee; that he had worked with him since starting at AK Media; that they had worked on important projects together and had a good working relationship; and that Hall was a nice guy and got along with other employees.

As he was instructed, Sofia told Hall to recommend those Operations Department employees he felt could do the job. Hall spent two to three days and nights preparing a handwritten list, which he gave only to Sofia. In preparing the list, he relied on his years of experience and on his own criteria of seniority, performance, character, and experience. Hall also consulted employee files he kept in the Operations Department. Before submitting his recommendations to Sofia, Hall showed them to Bill Hull, who agreed with his choices.

At the time Hall composed his list of recommendations, he was on AK Media's payroll and functioning as AK Media's Operations Manager. He did not know whether Eller Media would offer him a job. In fact, Jacobs was trying to choose between Charlie Neville, the Eller Media Operations Manager, and Hall for the position of Operations Manager at the new Eller Media.

During the week between Christmas and New Years, Jacobs met with Sofia and Hall in Miami to review the list of recommended Operations Department employees. At this meeting, several employees were discussed, including petitioner Curtis Major. At the time, Major was the supervisor of Posting. Hall had included Major on his recommendation list in the position of billposter, not Posting Supervisor, the job Major held at AK Media. At the meeting, however, Sofia expressed concern about Major's ability to cooperate with and be supervised by Orlando Ortiz, the employee chosen to act in the dual capacity of Posting Supervisor and Safety Director in the new Operations Department. Jacobs determined from the discussion with Sofia and Hall that Major should not be offered employment because he had trouble supervising, was not a safe worker, and had difficulty accomplishing his workload. At

the time of this meeting and when Jacobs later made the hiring decisions, he did not know the race of any of AK Media's employees.

On January 4, 2000, a list posted above the time clock at AK Media named those Operations Department employees who were not to be offered employment with Eller Media. The petitioners' names were on that list. The listed employees were asked to convene on the second floor, where AK Media personnel distributed the AK Media severance documents and reviewed them with the terminated employees.

The forty-two terminated employees, including the petitioners, were given a Separation Agreement and General Release to read and sign. Under the terms of the Agreement, the terminated employees waived and released AK Media from any claims that "have arisen up through the date of this Agreement, including those related in any way to his/her employment by [AK Media] or ***his/her separation***." (R3-61-Ex.C-2; emphasis added.) The waived claims included any the employees might have had under federal, state, or local discrimination laws and any other claims "growing out of" their terminations from AK Media. Specifically, the terminated employees, in exchange for severance pay, waived all claims under Title VII, the 1991 Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, and the Employee Retirement Income and Security Act of 1974.

The petitioners signed the Agreement and collected their severance pay.

Also, on January 4, 2000, Frank Sofia, Don Hall, and the remaining AK Media employees learned that they had jobs with the new Eller Media.

B. The Proceedings Below

1. The Complaint

Despite having agreed to waive any and all discrimination claims they may have had against AK Media, the petitioners filed EEOC discrimination complaints against AK Media and later amended their EEOC charges to include Eller Media. The petitioners then sued Eller Media, each alleging identical claims under Title VII, § 1981, and Florida's Civil Rights Act. Each plaintiff claimed that Eller Media "engaged in discriminatory employment practices . . . which resulted in Plaintiff . . . not being hired and/or retained by Defendant Eller Media . . . for employment in conjunction with its purchase of AK Media on the basis of his race." (R1-1-16-18.) Thus, the plaintiffs' case against Eller Media was one of disparate treatment, not disparate impact. Moreover, the plaintiffs' factual allegations did not support their claim that Eller Media had "engaged in discriminatory employment practices." Rather, their complaint asserted that Eller Media was liable for race discrimination because it had "acted upon Hall's recommendations" and Hall had, ***"[d]uring his tenure as Operations Manager for AK Media/Florida,"*** allegedly "engaged in discriminatory practices and disparaging behavior toward [AK's] African American employees." (R1-1-8; emphasis added.)

2. Summary Judgment

Eller Media moved for summary judgment arguing, among other things, that the petitioners sought to hold it vicariously liable for Don Hall's racial bias, which, allegedly, was expressed while Hall was AK Media's employee, and that Eller Media could not be held vicariously liable

for Hall's alleged discriminatory animus because Hall was neither its employee nor its agent before January 4, 2000.[2]

The district court granted Eller Media's summary judgment motion, concluding that Eller Media could not be held vicariously liable for Hall's allegedly biased recommendations because Hall was not Eller Media's agent (Pet. App. B at 9a) and because the petitioners' "cat's paw" theory[3] could not, under existing law, be applied "to find an employer liable for the discriminatory animus of a non-employee." (Pet. App. B at 13a.) The court reached this conclusion after determining from the undisputed facts that, although Eller Media had requested Hall to provide staffing recommendations, Eller Media did not control the process through which Hall made his selections and it retained control over the ultimate hiring decisions. (Pet. App. B at 8a.) Thus, as the district court correctly ruled, because ***control***, an essential element of an agency relationship, was lacking, Hall could not be deemed Eller Media's agent, and Eller Media could not be held vicariously liable for Hall's allegedly discriminatory recommendations.

The district court's opinion remains unpublished and does not appear in electronic data bases.

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[2] Eller Media also moved for summary judgment on the grounds that none of the petitioners could prove a prima facie case of race discrimination and that, even if they could, there was no evidence of discriminatory animus on the part of Don Hall or of pretext on the part of Eller Media.

[3] *See Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (citing several "cat's paw" cases and presenting various definitions of the theory).

3. The Appeal

The plaintiffs appealed to the Eleventh Circuit, raising two points in their initial brief. They argued that the district court "failed to properly apply the various theories of agency under which Eller may be held liable," and that it erred in holding that the "cat's paw" doctrine was inapplicable to the facts of this case. After briefing and oral argument, the appellate court affirmed the summary final judgment for Eller Media. (Pet. App. A at 2a.)

The Eleventh Circuit's opinion is printed in a *table* in the federal reporter and contains one word – "affirmed."

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Summary Affirmance Does Not Create Conflict or Precedent, and the District Court's Unpublished Opinion Is Limited To the Specific Facts Of This Case

The Eleventh Circuit's summary affirmance does not create conflict with any other circuit court decision. To their credit, the petitioners do not contend that the one-word opinion creates conflict; yet it is well established that this Court rarely exercises its discretionary jurisdiction unless the opinion sought to be reviewed "conflict[s] with the decision of another United States court of appeals on the same important matter." U.S. Sup. Ct. Rule 10(a); *see Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (quoting precursor to Rule 10) (Stevens, J., concurring). The petitioners seem to suggest, instead, that the unfavorable result below somehow "conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c). But, as is obvious from

the one-word opinion, the Eleventh Circuit did not decide an important question of federal law in this case, and without such a decision, conflict with a decision of this Court is impossible.

Moreover, the Eleventh Circuit's summary affirmance has no precedential value. By affirming without a written opinion, the Eleventh Circuit merely approved the *result* reached by the district court; it did not expressly approve its opinion or adopt its reasoning. *See DeShong v. Seaboard Coast Line R.R. Co.*, 737 F.2d 1520, 1523-24 (11th Cir. 1984) (citing *American Fid. & Cas. Co. v. Indem. Ins. Co. of N. Am.*, 308 F.2d 697, 699-700 (6th Cir. 1962)). Therefore, future litigants may not look to the Eleventh Circuit's opinion in this case as standing for any proposition or rule of law, especially in light of the fact that the decision it affirmed remains unpublished and unavailable from electronic databases.

Even if the district court's decision had been published, *it* would have no precedential value. *See Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (noting that district courts are not bound, under the doctrine of *stare decisis*, to follow the decision of another district court ***even where the facts*** of a prior district court case ***are the same*** as those later presented to another district court); *In re: Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) ("District Court decisions do not establish the law of the circuit."); *Kalka v. Hawk*, 215 F.3d 90, 100 (D.C. Cir. 2000) ("District court decisions have no precedential effect.").

The district court's decision has no precedential effect. Thus, the petitioners incorrectly state that "the decision below, affirmed on appeal, shields ***an*** employer from

liability under Title VII for its discriminatory failure to hire when that decision is based on the employer's solicited recommendation of a non-employee." (Pet. at 10; emphasis added.) This case turns on the specific facts surrounding Hall's process of making his recommendations and on whether those specific facts showed that Hall was acting under Eller Media's control and thus as its agent. The district court correctly concluded that the specific facts in this case did not support the petitioners' agency theory and ruled that Eller Media could not be held vicariously liable.

Future cases involving a purchasing company's nonretention of the selling company's employees will involve different facts, which will lead to results consistent with those facts. The district court's opinion in this case will not help. Therefore, the district court's holding, or as the petitioners put it, its "fundamental error," will *never* have the "serious and potentially wide-ranging consequences in Title VII litigation" that the petitioners so direly – but mistakenly – predict. (Pet. at 10.)

II. The Petitioners Seek Error Correction

It is obvious from their petition that the petitioners seek this Court's review only because they believe that "the Eleventh Circuit erred in affirming the District Court's conclusion that Don Hall was not Eller's 'agent' for purposes of Title VII." (Pet. at 14.) The petitioners ask this Court to "correct this result." (Pet. at 15, 18.) In other words, the petitioners come to this Court seeking error correction. They want this Court to review the same facts that the district and circuit courts reviewed and then reach the opposite conclusion: that Don Hall *was* Eller

Media's agent. But this Court "do[es] not grant a certiorari to review evidence" or to "discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Yet this is precisely what the petitioners are asking this Court to do.

The only way this Court could address the petitioners' argument that the "facts establish an agency relationship between Eller Media and Don Hall sufficient for purposes of Title VII" (Pet. at 15) would be to review the depositions and other evidence and "discuss specific facts." This Court does not do this because its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt*, 451 U.S. at 275 n.5 (Stevens, J., concurring).

III. Eller Media Was Entitled to Summary Final Judgment Because Eller Media Exercised No Control Over – and Had No Right to Control – Don Hall At the Time He Made His Recommendations; Therefore, Hall Was Not Its Agent For Purposes of Imputing Title VII Liability

At the time Don Hall prepared the list of AK Media Operations Department employees whom he recommended that Eller Media hire, he was employed by AK Media, on its payroll, and its Operations Department manager. When the petitioners signed AK Media's Severance Agreements and accepted its generous severance pay, they waived their ability to sue AK Media, Hall's employer, for any discrimination occurring while they were employed at AK Media and for any discriminatory actions Hall may have taken while he was employed by AK Media. The petitioners made a choice between giving up the right to

sue AK Media and preserving the right to sue but forfeiting their severance pay. Given the petitioners' choice to give up their right to sue and to accept severance pay, this case must not be viewed, as the petitioners would have it, as one where the allegedly wronged employees were cheated of a discrimination defendant.

Acknowledging that Eller Media had no discriminatory animus, the petitioners sued Eller Media on a vicarious liability theory that has only been applied to impute to an employer the discriminatory conduct of its employee or agent. *See Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993) (observing that general agency principles governing the liability of a principal under Title VII come into play only "[o]nce an agency relationship has been established"). An alleged principal cannot be held liable under agency principles for the conduct of one who was never its agent or employee. *See Graves v. County of Dauphin*, 98 F. Supp. 2d 613, 619 (M.D. Pa. 2000). To have prevailed below, the petitioners were required to show sufficient facts to support a finding that Hall was Eller Media's agent. They did not because they could not.

The petitioners tell this Court, as they did the other two courts, that Hall was Eller Media's agent because Eller Media gave him "the exact numbers by which it sought to reduce existing AK Media personnel," "asked Hall to provide [it] with his recommendations," "identified criteria," and "dictated the time frame." (Pet. at 15.) As the district court correctly ruled, none of these factors, whether viewed separately or together, rose to the level of control or right of control required for a finding of agency, even if the term "agent" is "liberally construed." (Pet. at 16.) *See Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir. 1982) (noting that, even in Title VII cases, the term

"employee" is to be construed in light of general common law concepts).

In determining whether an agency was created for the purpose of imputing liability under Title VII, federal courts are to apply the general common law of agency. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998). Under the *Restatement (Second) of Agency*, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and ***subject to his control***, and consent by the other so to act." *Restatement (Second) of Agency* § 1(1) (1958) (emphasis added). It has been said that the "critical factor in determining the existence of an agency relationship is the ***degree of control*** exercised by the principal over the agent." *Figi Graphics, Inc. v. Dollar Gen. Corp.*, 33 F. Supp. 2d 1263, 1266 (S.D. Cal. 1998) (emphasis added).

An agency relationship exists only if the principal retains *both* the right to control the ***result*** accomplished *and* the right to control the ***details and means*** by which the result is accomplished. *See Cobb*, 673 F.2d at 339, 342 (affirming the district court's conclusion – in a discrimination case – that no agency existed because "there was no 'supervision' of how the work was to be done"). *See also Bahadirli v. Domino's Pizza*, 873 F. Supp. 1528, 1537 (M.D. Ala. 1995) (noting – in a discrimination case – that "[o]f primary importance" is "the right of the alleged principal to control the day to day functions of the alleged agent"). *Accord Restatement (Second) of Agency* § 1(1) cmt. b ("The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the

fiduciary is subject to the directions of the one on whose account he acts.").

It is well established that if the alleged principal has no control over the alleged agent's day-to-day activities or task details but has the right to dictate only the ***end result***, then no agency exists. *See Figi Graphics*, 33 F. Supp. 2d at 1266 (emphasis added). In other words, "[i]f a party controls only the outcome of the endeavor, and not the means used to achieve the outcome, then an agency relationship does not exist." *United States v. Tianello*, 860 F. Supp. 1521, 1524 (M.D. Fla. 1994) (citing *Dorse v. Armstrong World Indus., Inc.*, 513 So. 2d 1265, 1268 n.4 (Fla. 1987) (noting that in a true agency relationship, the principal must ***control the means used*** to achieve the outcome, not just the outcome itself)). *Accord Fenton v. Freedman*, 748 F.2d 1358, 1362 (9th Cir. 1984) (noting that if the principal's control may be exercised only as to the result of the services performed and not the means and methods by which it is accomplished, the provider is not an agent).

When these common law agency principles are applied to the undisputed facts of this case, as the district court did here, it is evident that Don Hall was not Eller Media's agent as a matter of law. Frank Sofia, AK Media's accounting manager and human resources coordinator, asked Hall, at Jacob's behest, to recommend Operations Department employees to be offered employment by Eller Media. Jacobs spoke only to Sofia about obtaining the recommendations. Jacobs never spoke to Hall, never gave him any specific criteria or formula to use in selecting the employees to be recommended; never asked Hall what criteria he was going to use; never followed up with him to see what he was doing or how he was doing it; never supervised or

assisted him in the task; and never suggested that he include or exclude any employee or group of employees.

Hall relied on his own thirty years of experience in the business and on his own criteria of seniority, performance, character, and experience. He acted without supervision over a two-to-three-day period to reduce the Operations Department personnel to the number needed. When Hall prepared his handwritten list of recommendations, he was employed by and on the payroll of AK Media and functioning as AK Media's Operations Department manager. He had not received an offer from or accepted a position with Eller Media. In fact, Jacobs was not sure whom he would select as the operations manager of the new Eller Media. After showing Hull his preliminary recommendations, Hall gave his final recommendations only to Sofia. At the time, Hull and Sofia were AK Media employees. And last, Hall had absolutely no authority to offer employment to any of the individuals on his list, no matter what his opinion of them was.

The petitioners argue to this Court, as they did to the other two courts, that Hall was Eller Media's agent because Eller Media had communicated to him the "exact numbers" of employees to be retained and "identified criteria" such as that the retained employees should be able to do multiple jobs. (Pet. at 15.) But what the petitioners still fail to grasp is that what Eller Media communicated to Hall was the expected ***result***: X employees that could do Y. It did not tell him ***how*** to make his selection. It provided him no tools, direction, supervision, or guidance. Under the common law of agency, where the alleged principal communicates only the intended result and does not direct the means or supervise the methods of obtaining the result, an agency relationship subjecting an innocent

principal to Title VII liability cannot be created. *See United States v. Tianello*, 860 F. Supp. at 1524.

The petitioners appear to construe the district court's opinion as holding that Hall was not Eller Media's agent because he was a "non-employee" at the time he made the recommendations and at the time that Eller Media made its hiring decisions. (Pet. at 14, 15.) Yet even a cursory reading of the opinion reveals that the district court did not base its ruling on Hall's status as a "non-employee." (Pet. at 14, 15.) The district court specifically reasoned that, because Hall was not Eller Media's employee at the time he made the staffing recommendations, it had to look to the *Restatement (Second) of Agency* "for an ***agency*** determination." (Pet. App. B at 8a; emphasis added.) Correctly concluding that the "key issue" was "whether Eller Media had **control** of Mr. Hall's activities during this undertaking," the court held that the evidence did not support a finding that Eller Media had the requisite control over Hall or the recommendation process. (Pet. App. B at 8a; emphasis in original.)

Citing to *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 933 (D.S.C. 1997), the district court reasoned that because Eller Media did not name specific individuals it wished to employ and did not involve itself in Hall's selection process, it could not be held vicariously liable under agency theory. (Pet. App. B at 9a.) In reaching its conclusion, the district court further reasoned that "Hall had no authority, apparent or otherwise, to hire any employees for Eller"; that Hall "did not have a job offer at the time he made the staffing recommendations"; that, in making the recommendations, Hall had benefited both AK Media and himself; and thus that Hall had not been acting

exclusively for the benefit of Eller Media. (Pet. App. B at 10a.)

Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) (*"Manhart"*) and *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) (*"Norris"*), do not apply here and do not support a different conclusion. First of all, *Manhart* is not an agency case. There, the discrimination defendant, the Department of Water and Power, administered retirement, disability, and death-benefit programs for its employees. 435 U.S. at 704-05. Because no private insurance company was involved, it was the Department itself, not an agent, that imposed the discriminatory requirement that female employees make monthly contributions to the retirement fund that were higher than the contributions required of comparable male employees. *Id.* at 705. The female employees' discrimination suit against the Department, their employer, was therefore based on direct, not vicarious, liability.

Norris is also inapposite. There, the employer, the State of Arizona, did not administer the deferred compensation program at issue. Instead, it chose several private insurance companies to participate in the plan and entered into contracts with those companies to provide the retirement benefit. Employees enrolling in the plan could obtain retirement benefits only from one of the companies the State had contracted with. The plan was discriminatory because it paid female retirees lower benefits than it paid male retirees who had made the same contribution.

Agency was not an issue in *Norris*. It was not disputed that, by written contract, the insurance companies were the State's agents for the provision of this employment

benefit. But even if they were not, as this Court reasoned, "the State of Arizona was itself a party to contracts concerning the annuities to be offered by the insurance companies, and it is well established that both parties to a discriminatory contract are liable for any discriminatory provisions the contract contains, regardless of which party initially suggested the inclusion of the discriminatory provisions." 463 U.S. at 1090. Therefore, the employer's liability in *Norris*, as in *Manhart*, was direct, not vicarious.

Finally, *Meyer v. Holley*, 123 S. Ct. 824 (2003), supports Eller Media's position, not the petitioners'. In *Meyer*, a real estate agent allegedly prevented an interracial couple, the plaintiffs, from buying a house for racially discriminatory reasons. The plaintiffs sued the salesman and the real estate company for violation of the Fair Housing Act. It then sued the company's president and sole shareholder, individually, claiming that he also was vicariously liable for the salesman's unlawful actions. The district court dismissed the claims against the owner, but on appeal, the Ninth Circuit reversed, interpreting the Fair Housing Act to permit the owner to be held personally liable because he had the "right to control" the actions of the sales agent. *Id.* at 829. The owner sought certiorari. This Court granted the owner's petition to decide the issue of whether owners and officers of corporations can be held liable under the Act even if they did not direct or authorize the unlawful discriminatory acts. *Id.* at 828.

This Court reversed the Ninth Circuit because its holding incorrectly construed the Act as departing from traditional vicarious liability principles. As this Court noted, under traditional agency principles, "it is the corporation, not its owner or officer, who is the principal or

employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Id.* at 829. In *Meyer*, this Court confirmed that traditional agency principles are to be applied in the discrimination context. Therefore, here, the district court's ruling was eminently correct.

It cannot be denied that the district court applied traditional agency principles to the undisputed facts when it ruled that Eller Media did not exercise control over Hall or the means and methods he used in composing his list of recommendations, and that Eller Media had no right to control Hall because he was employed by AK Media and exclusively subject to *its* control. Had the district court held Eller Media vicariously liable for the discriminatory acts of a non-employee and non-agent, as the petitioners are now asking this Court to do, then it would have erroneously applied *non*traditional agency principles, as the Ninth Circuit did in *Meyer*.

CONCLUSION

While the petitioners correctly state that "[i]n the Title VII context, traditional agency principles guide" the determinations of the vicarious liability of principals or employers for the acts of their agents or employees (Pet. at 16), they refuse to acknowledge that the district court correctly applied these traditional agency principles. Under traditional agency principles, an alleged principal cannot be held liable for the acts of an alleged agent unless the principal controlled the agent in the accomplishment of the desired result. After reviewing the facts, the district court correctly concluded that Eller Media had no control

over Hall while he was employed by AK Media and thus that Hall was not Eller Media's agent. The district court did as this Court recommended in *Meyer*. In assessing "which 'of two innocent people must suffer,'" the district court determined the matter in accordance with traditional principles of vicarious liability. Because the district court did not err and because its decision has no precedential effect, the certiorari petition should be denied.

Respectfully submitted,

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